IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 13, 2005

STATE OF TENNESSEE v. LAURA ANN PEDEN

Appeal from the Circuit Court for Marshall County
No. 16418 Robert Crigler, Judge

No. M2005-00983-CCA-R3-CD - Filed March 23, 2006

The Appellant, Laura Ann Peden,[1] appeals the sentencing decision of the Marshall County Circuit Court. Peden pled guilty to nine counts of forgery and was sentenced, as a Range II, multiple offender, to an effective seven-year sentence. The length and manner of service of the sentences were submitted to the trial court for determination. Following a hearing, the court ordered that Peden's sentences be served in the Department of Correction. On appeal, Peden argues that the trial court erred in denying an alternative sentence. After a review of the record, we affirm the decision of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the Appellant, Laura Ann Peden.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; W. Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The statement of facts, as recited at the guilty plea hearing, established that the Appellant's boyfriend stole a checkbook belonging to Heather Clark. On September 20 through September 22, 2004, the Appellant forged nine checks on Clark's account, passing the forged checks to various businesses, including Quick-Mart, By-Pass Liquor Store, Sugar and Spice Market, Wal-Mart, and

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[1] The Appellant is charged in the indictment under the name "Laura Ann Peden AKA Laura Ann Hulshof." The judgment of conviction forms reflect the name Laura Ann Hulshof. At the guilty plea hearing, the Appellant said her middle name was Peden and her last name was Hulshof.

Food Lion. Several witnesses positively identified the Appellant as the person who passed the checks at their particular stores.

On December 8, 2004, a Marshall County grand jury returned an indictment against the Appellant charging her with nine counts of forgery and nine counts of passing forged papers. On February 9, 2005, the Appellant entered an open guilty plea to all charges. A sentencing hearing was held on April 6, 2005, at which it was determined that the Appellant was a Range II, multiple offender. The presentence report, which was admitted into evidence, established that the thirty-eight-year-old Appellant had numerous prior felony and misdemeanor convictions, including prior forgeries. At the hearing, the Appellant admitted to twenty-four prior convictions in addition to the current convictions. Additionally, it was established that the Appellant had previously been granted probation in both Tennessee and Texas, with revocations occurring in both states. Moreover, at the time of the hearing, the Appellant was incarcerated in the Department of Correction as a result of a parole violation. The Appellant testified that her crimes had all been committed in order to support her long-standing drug habit. She testified that she needed long-term rehabilitation and that she wanted to make restitution to the victims.

After hearing the evidence presented, the trial court sentenced the Appellant to three and one-half years for each of the Class E felony forgery convictions. The court merged the Appellant's convictions for passing forged papers with the corresponding convictions for forgery. Following the grouping of offenses by dates, the trial court ordered: (1) that the group consisting of counts 1, 3, 7, and 9 shall run concurrently; (2) that the group consisting of counts 5, 11, 13, 15, and 17 shall run concurrently; and (3) that the sentences from each of the two groups shall run consecutively "for an effective sentence of 7 years as a Range II multiple offender."[2] The trial court further ordered that the effective seven-year sentence be served in the Department of Correction. The Appellant appeals the sentencing decision ordering that her sentences be served in confinement.

Analysis

On appeal, the Appellant argues that the trial court erred in denying the Appellant's request for an alternative sentence, specifically that of probation. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. Because the trial court did not properly apply the sentencing principles, the presumption of correctness is not afforded in this case.

[2] By our calculation, this sentencing arrangement cannot be reconciled with the sentences as reflected by the judgment forms. No challenge, however, is presented with regard to the length of the aggregate sentences on appeal.

When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. T.C.A. § 40-35-102, -103, -210 (2003); *Ashby*, 823 S.W.2d at 168. The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d).

At trial and on appeal, the Appellant argues that she is presumed to be a favorable candidate for alternative sentencing and that the State has failed to introduce any evidence to the contrary. The State also argues that the Appellant "falls under this presumption" of alternative sentencing. Similarly, the trial court, at the conclusion of the sentencing hearing, found that: "There is a presumption for E felonies in favor of alternative sentencing." The positions advanced by the Appellant, the State, and the trial court, as applicable to this case, are incorrect. A defendant who is sentenced as a Range II, multiple offender, receives no presumption in favor of consideration of alternative sentencing. *See* T.C.A. § 40-35-102(6). Thus, because the Appellant was sentenced as a Range II offender, the presumption does not apply in this case. Nonetheless, the Appellant remains eligible for probation because she received a sentence of eight years or less. T.C.A. § 40-35-303(a) (2003).[3] However, in view of her Range II status, it is the Appellant, not the State, who bears the burden of establishing suitability for an alternative sentencing option. In determining the Appellant's suitability for a non-incarcerative alternative, this court considers whether:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1).

The presentence report, which was not disputed, establishes that the Appellant has twenty-four prior convictions, including five felony convictions. *See* T.C.A. § 40-35-103(1)(A). The report further reflects that efforts less restrictive than confinement have frequently and recently failed, as the Appellant has violated programs of both probation and parole. *Id.* at (1)(C). Indeed, the Appellant is currently serving a four-year Department of Correction sentence for felony escape following revocation of her parole. After a *de novo* review of the record, we conclude that the

[3]This provision has since been amended to provide that a defendant is eligible for probation if the actual sentence imposed is ten years or less. T.C.A. § 40-35-303 (amended June 7, 2005).

Appellant has failed to carry her burden of demonstrating that the sentences of confinement, as imposed by the trial court, were improper.

CONCLUSION

Based upon the foregoing, the trial court's denial of alternative sentencing is affirmed.

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DAVID G. HAYES, JUDGE